



**I. NATURE OF ACTION**

**A. Plaintiff's Contentions:**

This action arises out of Defendant, Alan Engelke ("Engelke") striking, breaking and then burying an underground salt water disposal pipe line ("Line") in and about October, 2013. After striking and breaking the Line, Engelke failed to contact the owner of line, Avery Bakken ("Avery") or the One Call Notification Center ("Center"), as required under Montana statutory law relative to his striking and breaking the Line. At the time Engelke struck and broke the Line, it was out of service undergoing repairs. Avery eventually placed the Line back in service in May, 2014, running salt water through its Line. Salt water running through the Line found its way to the area where Engelke struck and broke the Line resulting in a significant amount of salt water releasing from the break in the Line and into the environment.

Avery took affirmative steps to clean up the release in which it incurred considerable expense in doing so. Avery made a claim on his insurance policy issued by Plaintiff, Mid Continent Casualty Company ("Mid-Continent"). Mid-Continent covered and paid out for the costs, expenses and damages arising out the saltwater release. Mid Continent has made Avery whole. Mid Continent now makes a claim of subrogation against the named defendant seeking to be paid for all costs, expenses and damages it paid arising out of the cleanup of the release.

2013 version of Section 69-4-503(6), MCA states in relevant part:

(6) . . . If an excavator discovers an underground facility that has not been located and marked, the excavator shall stop excavating in the vicinity of the facility and notify the facility owner or the one-call notification center.

The 2013 version of Section 69-4-505(4), MCA states:

(4) The act of obtaining information as required by this part does not excuse an excavator making any excavation from doing so in a careful and prudent manner, nor does it excuse the excavator from liability for any damage or injury resulting from the excavator's negligence.

Dry Prairie contracted with Engelke to excavate/dig a trench on real property owned by Joe Picard. Prior to the excavation work being started, Dry Prairie marked the path that Engelke was to perform his digging. While Engelke was performing his excavation along the path established by Dry Prairie, he struck the Line and damaged it. After striking the Line, Engelke failed to contact Avery or the Center for purposes of reporting his striking and damaging the Line. Instead, Engelke simply buried the Line and continued on with his digging. Mid Continent contends that Engelke was negligent in not contacting the owner of the Line or the Center and such negligence caused the release of saltwater into the environment. Mid Continent further contends that any negligence in Avery failing to be registered with the Center is cutoff by Engelke's negligence and Engelke's negligence is the superseding intervening cause of the Release and the costs and expenses Mid-Continent incurred in cleaning up the Release.

**B. Defendant Engelke's Contentions:**

This is negligence claim brought by Mid Continent Casualty Company (Mid Continent) against Alan Engelke (Engelke) arising out of excavation work performed by Engelke on behalf of Dry Prairie Rural Water Authority (Dry Prairie), the operator of a water business in northeast Montana, to extend its water lines to provide new services to property owned by Joe Picard (Picard). Engelke, before performing the excavation/trenching work, visually inspected the ground upon which the work was going to be performed, spoke with Picard who told him that any pipelines that he would be probably abandoned and finally, did what was required of him by Montana's Dig Law and that was to contact the one-call notification center, before excavation, to obtain information concerning the possible location of underground facilities (pipes) from every underground facility owner required to be a member of the one-call notification center. As a result, Engelke received a one-call ticket identifying underground facility owners in the area of where his work was going to be performed so that he could comply with any and all duties to contact them concerning the proposed excavation.

Engelke, while performing the excavation work, struck and damaged a pipe that was obviously and clearly not in use. The pipe was one of many

pipes that had been abandoned on or near the property at issue and which Picard had previously referred to. Engelke contacted Picard who told him that the pipe, clearly not in use, was abandoned and further explained that another contractor, Franz Construction, had previously dug over 100 holes in the same area and had also damaged abandoned pipe. Picard, the property owner who had been advised by Engelke of the situation, told Engelke that if it was him, he would not fix the pipe but instead cover it up and continue with the excavation work since he was unaware of any active line being in the area where Engelke was performing his work.

There is no dispute that the pipe in question was a saltwater disposal line running from the Anvil Well, some significant distance away, owned at that time by Windy Butte Disposal Facility, LLC (Windy Butte). Contrary to the mandatory requirements of §69-4-502(2)(a), MCA, Windy Butte was not a member of the one-call notification center. After the work was performed by Engelke, Windy Butte was purchased by Jeff Avery (Avery) in November of 2013 who immediately transferred his interest to Avery Bakken Disposals LLC (Avery Bakken). Avery was an owner of Windy Butte and also Avery Bakken. As a consequence, Avery was and is an agent of Windy Butte and Avery Bakken. Pursuant to the Stipulation of the parties (Doc. 40), Avery Bakken and Windy Butte are one and the same entity for

all purposes and that the acts, omissions or liabilities of Windy Butte are the acts, omissions or liabilities of Avery Bakken. Consequently, the acts or omissions of Avery Bakken, the insured of Mid Continent, as well as Windy Butte, are also the acts or omissions of Mid Continent. Mid Continent is negligent as a matter of law for the acts and omissions of Avery Bakken and Windy Butte.

Mid Continent's negligence in failing to register with the one-call notification center is the sole cause of Mid Continent's alleged damages. Engelke acted, under the circumstances of this case, in a careful and prudent manner. Engelke had not been provided the identity of the owner of the saltwater disposal line since Mid Continent had failed, as required by law, to register with the one-call notification center and Engelke acted in a careful and prudent manner in not only conducting the excavation work but upon striking the pipe conducting further investigation by confirming with the property owner, the person most knowledgeable concerning the lines under his property, as to the status of the pipe. The pipe was clearly not in use and there was no indication that it would be placed in use but appeared to be consistent with other pipes in the area that had also been abandoned. Had Engelke contacted the one-call notification center, their records would not have revealed the owner of this pipe since the owner, Mid Continent, had

failed to register with the one-call notification center. The sole or majority cause of the damages claimed by Mid Continent is as a result of Mid Continent's negligence thus barring Mid Continent from any recovery against Engelke in this matter.

## **II. JURISDICTION AND VENUE**

The Court has jurisdiction over the Plaintiff's claims against Engelke. Mid Continent is organized under the law of a state other than Montana. Therefore, the Court has diversity jurisdiction over this action pursuant to 28 U.S.C. S 1332 and venue is proper because the Defendant reside in the Montana Federal District Court, Billings Division, where this action is filed. The amount in controversy will exceed \$75,000 exclusive of interest and costs.

## **III. JURY TRIAL**

This action shall be tried before a six person jury, with one alternate.

## **IV. AGREED FACTS**

The following facts are agreed upon and require no proof:

- A. Plaintiff Mid Continent Casualty Company ("Mid Continent") is a registered insurance company with its principal place of business in a state other than Montana.
- B. Defendant Alan Engelke ("Engelke") is a resident of Roosevelt County, Montana.

- C. Avery Bakken Disposals, LLC (“Avery Bakken”) is a saltwater disposal company who services oil field operations.
- D. Avery Bakken was insured with a liability policy issued by Mid Continent.
- E. Mid Continent’s claims against Engelke is based upon Mid Continent’s right to make this claim of subrogation for monies it paid on behalf of its insured Avery Bakken.
- F. The saltwater disposal line in this litigation was located on real property owned by Joe Picard. Dry Prairie Rural Water Authority (Dry Prairie) had contracted with Joe Picard to install an underground water line on Mr. Picard’s property. Dry Prairie contracted with Engelke to perform excavation work on Mr. Picard’s property.
- G. At the time the saltwater disposal line in this litigation was hit and damaged, it was owned by Windy Butte Disposal Facility, LLC (“Windy Butte”).
- H. Avery Bakken owned the saltwater disposal line involved in this litigation at the time the break in the line was discovered.
- I. Avery Bakken and Windy Butte are one and the same entity for all purposes in this litigation and as such, the alleged acts, omissions or



liabilities of Windy Butte or Avery Bakken are the alleged acts, omissions or liabilities of Windy Butte and Avery Bakken.

J. Mid Continent, as the subrogor to Avery Bakken, its insured, is responsible for the alleged acts, omissions or liabilities of Windy Butte and Avery Bakken.

K. The Court has determined that Mid Continent was negligent in failing to register with the one-call notification center prior to Engelke commencing his excavation operations.

L. The Court has determined that Engelke was negligent for failing to stop his excavation operations and contact the owner of the saltwater disposal line or contact the one-call notification center after he struck and damaged the saltwater disposal line.

M. Montana law applies to this action.

**V. PLAINTIFF'S CLAIMS AGAINST DEFENDANTS: ELEMENTS OF LIABILITY**

A. Mid Continent brings claims of negligence against Engelke. The elements to prove negligence is (1) duty; (2) breach; (3) causation; and (4) damages.

**Duty:** The Line was owned by Avery Bakken ("Avery"), a salt water disposal company who services oil field operations. The Line

was located on Joe Picard's real property. Dry Prairie contracted with Joe Pickard to install an underground water line on Mr. Pickard's property. Dry Prairie contracted with Engelke to perform excavation on Mr. Pickard's property in the form of digging a trench on the property.

2013 version of Section 69-4-503(6), MCA states in relevant part:

(6) . . .If an excavator discovers an underground facility that has not been located and marked, the excavator shall stop excavating in the vicinity of the facility and notify the facility owner or the one-call notification center.

The 2013 version of Section 69-4-505(4), MCA states:

(4) The act of obtaining information as required by this part does not excuse an excavator making any excavation from doing so in a careful and prudent manner, nor does it excuse the excavator from liability for any damage or injury resulting from the excavator's negligence.

While Engelke was performing his excavation, he struck and broke the Line.

After striking the Line, Engelke had a duty under Section 69-4-503(6), MCA to contact Avery or the Center to report that he struck and broke the Line.

**Breach:** Engelke breached his duty under Section 69-4-503, MCA to contact Avery or the Center for purposes of informing either that he struck and broke the Line. Engelke simply buried the broken line and recommenced his excavation operations without informing Avery or the Center that he broke the Line.

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**Causation/Damage:**

Engelke failing to contact the Center or Avery for purposes of informing either that he broke the Line led to the salt water release that occurred months later when the Line was placed back in service. Had Engelke contacted the Center or Avery, the Line would have been repaired prior to the introduction of saltwater into the Line in May, 2014. Had the Line been repaired, the costs, expenses and damages associated with the cleanup would not have occurred.

Any negligence in Avery failing to be registered with the Center is cutoff by Engelke's negligence and Engelke's negligence is the superseding intervening cause of the Release and the costs and expenses Mid-Continent incurred in cleaning up the Release.

Engelke's negligence caused damages to Avery Bakken and in turn to Mid Continent that paid for the damages to be proven at the time of trial.

**VI. DEFENDANT'S DEFENSES: ELEMENTS OF DEFENSES**

Windy Butte and Avery Bakken acted negligently when failing to comply with the mandatory requirements of §69-4-502(2)(a), MCA by not being members

of the one-call notification center. Mid Continent is liable for the acts, omissions and liabilities of Windy Butte and Avery Bakken. Therefore, Mid Continent has acted negligently as a result of its violation of §69-4-502(2)(a), MCA.

Mid Continent's negligence was the sole or primary cause of Mid Continent's alleged damages. Engelke, prior to conducting the excavation work, complied with Montana's Dig Law by contacting the one-call notification center and obtaining a one-call ticket pursuant to §69-4-502(1)(a), MCA. The one-call ticket was dated September 29, 2013 and identified the owners of the underground facilities in the area of where Engelke's excavation work was to be performed. Engelke relied on the one-call notification ticket. In addition, Engelke confirmed with the property owner that any lines discovered during the excavation process were not active lines and had been abandoned. After striking the line, Engelke further inquired of the property owner Picard who clearly stated that the line was abandoned. The line was not in use and appeared to be abandoned. Had Engelke contacted the one-call notification center at that time, no new information would have been supplied to him as Mid Continent was not a member of the one-call notification center. Engelke acted as a careful prudent excavator would have acted under the same circumstances. There was no indication that this line was owned by Mid Continent or its subrogors. Furthermore, there was no indication that the line was anything other than an abandoned line consistent with other abandoned

lines in the same area. Engelke did not act negligently and any negligence determined by the Court was not a cause of any damages claimed by Mid Continent. Any damages claimed by Mid Continent were caused as a result of Mid Continent's negligence.

The negligence law and comparative negligence law of the State of Montana applies to this case. As a result, the negligence of Mid Continent bars Mid Continent from any recovery in this matter.

## **VII. PLAINTIFF'S RELIEF SOUGHT**

The relief sought against Engelke is for all damages, costs and expenses relative in any form to the clean up of the release caused by Engelke's negligence. Computation of damages total \$148,715.80 broken down with reference to Plaintiff's Will Offer Exhibits as follows:

- (1) Payment To Eklipse: \$122,903.00 [Exhibit 25: P-066];
- (2) Payment to Insured for out of pocket expenses (Insured payment for damages to third party and insured's deductible): \$10,956 [Exhibit 26: P-067];
- (3) Payment to Insured for out of pocket expenses (Insured payment for damage to third party and attorney fees incurred by Insured): \$9,537.00 (minus cost to repair line: paid but not claimed) [Exhibit 33: P-074]; and

- (4) Payment to Custard Insurance and Fox Hollow for clean up oversight and adjustment: \$5,219 [Exhibit 27: P-068; Exhibit 28: P-069; Exhibit 29: P-070, 30: Exhibit 30: P-071; Exhibit 31: P-072 and Exhibit 32: P-073].

#### **VIII. LEGAL ISSUES**

None to be decided at trial.

#### **IX. DISMISSALS**

Former defendants State Farm Fire and Casualty Company and Dry Prairie Rural Water Authority have been dismissed by way of their motions for summary judgment.

#### **X. DISCOVERY DOCUMENTS**

None.

#### **XI. WITNESSES**

Attached to this pretrial order are the following separate witness lists of the parties:

**A. Plaintiff's Inclusive Witness List:**

Plaintiffs' Inclusive Witness List is attached hereto.

**B. Engelke's Inclusive Witness List:**

Engelke's Inclusive Witness List is attached hereto.

## **XII. EXHIBITS**

Attached to this order are the exhibit lists of the parties. Objections not showing on the exhibit lists, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, are waived unless good cause is shown.

## **XIII. ESTIMATE OF TRIAL TIME**

Not including *voir dire*, opening statements and closing statements, the parties estimate that Mid Continent will require two days of trial to complete its case in chief. Engelke estimates, assuming that most witnesses have been called in Mid Continent's case in chief that he will require one half of a day to trial to complete his case in chief.

## **XIV. SUPERSESSION**

This Order supersedes the pleadings in this matter.

DATED this 13<sup>th</sup> day of November 2018.

  
SUSAN P. WATTERS  
United States District Judge

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Approved as to form and content:

STUBBS LAW, P.C.

/s/ Todd A. Stubbs  
TODD A. STUBBS  
*Attorney for Plaintiff Mid Continent*

STACEY & FUNYAK

/s/ Calvin J. Stacey  
Calvin J. Stacey  
*Attorney for Defendant Engelke*



**MID CONTINENT CASUALTY COMPANY'S WITNESS LIST/ INCLUSIVE**

*Mid Continent Casualty Co., v. Alan Engelke, et al.*

CV-17-41-BLG-SPW

Honorable Susan P. Watters

Plaintiff's Attorney: Todd A. Stubbs

Defendant's Attorney: Engelke: Calvin Stacey

Name	Manner of Presentation	Expert ? Y/N	Date of Report/ Deposition	Deposition Designation	Will Call	May Call	Objections
Jeff Avery c/o Todd A. Stubbs P.O. Box 169 Manhattan, MT 59741 (406)282.0515	In person or Videotaped Deposition Testimony	N	February 16, 2018	Total Deposition, excluding excerpts: 46:15- 47:7. (Obj. 402- 403)	X		
George Chahalais c/o Todd A. Stubbs P.O. Box 169 Manhattan, MT 59741 (406)282.0515	In person	N			X		
Alan Engelke	In person or Videotaped Deposition Testimony	N	February 16, 2018	Deposition Excerpt 1-37:19	X		
Joseph Picard 4944 Rd. 1006 Bainville, MT 59212	Videotaped Deposition Testimony	N	February 16, 2018	Total Deposition		X	

**MID CONTINENT CASUALTY COMPANY'S WITNESS LIST/ INCLUSIVE***Mid Continent Casualty Co., v. Alan Engelke, et al.*

CV-17-41-BLG-SPW

Honorable Susan P. Watters

Plaintiff's Attorney: Todd A. Stubbs

Defendants' Attorneys: Engelke: Calvin Stacey/ Dry Prairie: Jacqueline Papez

Name	Manner of Presentation	Expert ?Y/N	Date of Report/ Deposition	Deposition Designation	Will Call	May Call	Objections
Robert Schmidt MT Dept Oil & Gas Plentywood, MT (406) 698.5266	In person or video testimony	N				X	
Joni Sherman c/o Jacqueline Papez P.O. Box 1185 Helena, MT 59624 (406)443.2211	In person or videotaped deposition	N	February 16, 2018	Total Deposition		X	
Troy Spradley c/o Jacqueline Papez P.O. Box 1185 Helena, MT 59624 (406)443.2211	In person or Videotaped Deposition	N	February 16, 2018	7:16-22; 8:18-24; 10:8-25; 11:1-13:18; 14:13-16:15; 17:2-19:15; 23:15-27:25; 30:12-35:25		X	

**MID CONTINENT CASUALTY COMPANY'S WITNESS LIST/ INCLUSIVE**

*Mid Continent Casualty Co., v. Alan Engelke, et al.*

CV-17-41-BLG-SPW

Honorable Susan P. Watters

Plaintiff's Attorney: Todd A. Stubbs

Defendants' Attorneys: Engelke: Calvin Stacey/ Dry Prairie: Jacqueline Papez

Name	Manner of Presentation	Expert ?Y/N	Date of Report/ Deposition	Deposition Designation	Will Call	May Call	Objections
Erik Vandenburg c/o Todd A. Stubbs P.O. Box 169 Manhattan, MT 59741 (406)282.0515	In person and/or live video testimony	N				X	
Dewey Young Eklipse Resources P.O. Box 303 Fairview, MT 59221 (406) 769.2542	In person or live video testimony	N				X	

**ENGELKE'S WITNESS LIST/ INCLUSIVE***Mid Continent Casualty Co., v. Alan Engelke, et al.*

CV-17-41-BLG-SPW

Honorable Susan P. Watters

Plaintiff's Attorney: Todd A. Stubbs

Defendant's Attorney: Engelke: Calvin Stacey

<b>Name</b>	<b>Manner of Presentation</b>	<b>Expert ? Y/N</b>	<b>Date of Report/ Deposition</b>	<b>Deposition Designation</b>	<b>Will Call</b>	<b>May Call</b>	<b>Objections</b>
Jeff Avery c/o Todd A. Stubbs P.O. Box 169 Manhattan, MT 59741 (406)282.0515	Videotaped Deposition Testimony	N	February 16, 2018	Total Deposition, excluding excerpts: 46:15-47:7.	X		
George Chahal c/o Todd A. Stubbs P.O. Box 169 Manhattan, MT 59741 (406)282.0515	In person	N			X		
Alan Engelke	In person or Videotaped Deposition Testimony	N	February 16, 2018	Entire Deposition	X		
Joseph Picard 4944 Rd. 1006 Bainville, MT 59212	In person or Videotaped Deposition Testimony	N	February 16, 2018	Total Deposition	X		Rule 402 and 403, Fed.R.Civ.P

**PLAINTIFF'S EXHIBITS- WILL OFFER**

Case Name: Mid Continent Casualty Co., v. Alan Engelke, et al.

Case Number: CV-17-41-BLG-SPW

#	Description	Δ's Objections	Date Offered	Date Reserved	Date Admitted	Date Refused/ Withdrawn
2	Montana 811 Ticket (Depo. Ex. 2)	No Objection				
3	Engelke Statement (Depo. Ex. 3)	No Objection				
5	Google Earth Map (Depo. Ex. 5)	No Objection				
6	Contract for Purchase & Sale (Depo. Ex. 6)	No Objection				
7	Disposal Well Agreement (Depo. Ex. 7)	No Objection				
8	Bill of Sale (Depo. Ex. 8)	No Objection				
9	Assignment of Assets (Depo. Ex. 9)	No Objection				
10	Montana Board of Gas Notice of Intent to Change Operator (Depo. Ex. 10)	No Objection				

**PLAINTIFF'S EXHIBITS- WILL OFFER**

Case Name: Mid Continent Casualty Co., v. Alan Engelke, et al.  
Case Number: CV-17-41-BLG-SPW

#	Description	Δ's Objections	Date Offered	Date Reserved	Date Admitted	Date Refused/ Withdrawn
11	Montana Board of Gas Notice of Intent to Change Operator (Depo. Ex. 11)	No Objection				
12	Montana Board of Gas Notice of Intent To Change Operator (Depo. Ex. 12)	No Objection				
13	Eclipse Resource, LLC, Invoices P001-010 (Depo. Ex. 13)	No Objection				
14	Haakan Jorgenson Check (Depo. Ex. 14)	No Objection				
15	Plaintiff's Resp to DP's 1 <sup>st</sup> Disc. Req. (Depo. Ex. 15)	No Objection				
16	Google Map (Depo. Ex. 16)	No Objection				
17	Crowley Fleck Letter (Depo. Ex. 17)	No Objection				

**PLAINTIFF'S EXHIBITS- WILL OFFER**

Case Name: Mid Continent Casualty Co., v. Alan Engelke, et al.

Case Number: CV-17-41-BLG-SPW

#	Description	Δ's Objections	Date Offered	Date Reserved	Date Admitted	Date Refused/ Withdrawn
19	Contract For Purchase (Depo. Ex. 19)	No Objection				
21	Ownership Encumbrance Report (Depo. Ex. 21)	No Objection				
22	Affidavit of Pipeline Easement (Depo. Ex. 22)	No Objection				
23	Google Map (Depo. Ex. 23)	No Objection				
24	Google Earth Map (Depo. Ex. 24)	No Objection				
25	Mid Continent Payment Voucher P-066	No Objection				
26	Mid Continent Payment Voucher P-067	No Objection				
27	Mid Continent Payment Voucher P-068	Rule 402; Not recoverable				
28	CIA Custard Invoice P-069	Rule 402; Not recoverable				

**PLAINTIFF'S EXHIBITS- WILL OFFER**

Case Name: Mid Continent Casualty Co., v. Alan Engelke, et al.  
Case Number: CV-17-41-BLG-SPW

#	Description	Δ's Objections	Date Offered	Date Reserved	Date Admitted	Date Refused/ Withdrawn
29	Mid Continent Payment Voucher P-070	Rule 402; Not recoverable				
30	Fox Hollow Invoice P-071	Rule 402; Not recoverable				
31	Mid Continent Payment Voucher P-072	Rule 402; Not recoverable				
32	Fox Hollow Invoice P-073	Rule 402; Not recoverable				
33	Mid Continent Payment Voucher P-074	Rule 402; Not recoverable				
34	Photo-P-075 Oil Signs	Rule 402 and 403				



**PLAINTIFF'S EXHIBITS- MAY OFFER**

Case Name: Mid Continent Casualty Co., v. Alan Engelke, et al.

Case Number: CV-17-41-BLG-SPW

#	Description	Δ's Objections	Date Offered	Date Reserved	Date Admitted	Date Refused/ Withdrawn
35	Photo- P-076 Anvil spill downstream from Culvert	No Objection				
36	Phot-P-078 Anvil spill from top	No Objection				
37	Photo- P-079 Anvil spill by pipe	No Objection				
38	Photo-P-077 Anvil spill from bottom	No Objection				
39	Photo-P-080 Anvil spill	No Objection				
40	Photo- P-081 Anvil spill at pipe	No Objection				
41	Photo- P-083 Anvil Spill Photo	No Objection				
	Rebuttal Exhibits					
	Impeachment Exhibits					
	Any Other Admitted Exhibits					

**DEFENDANT'S EXHIBITS- MAY OFFER**

Case Name: Mid Continent Casualty Co., v. Alan Engelke, et al.

Case Number: CV-17-41-BLG-SPW

#	Description	Δ's Objections	Date Offered	Date Reserved	Date Admitted	Date Refused/ Withdrawn
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50	Engelke's Dry Prairie Statements (DP003-069)	Objection-402				
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